Nautical Supreme Sdn Bhd v Jaya Sudhir a/l Jayaram & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-2296–11 OF 2017
BADARIAH SAHAMID, SURAYA OTHMAN AND STEPHEN CHUNG JJCA
17 JANUARY 2019

Arbitration — Arbitration proceedings — Injunction — Disputes between defendants referred to arbitration — Plaintiff applied for injunction to restrain from continuing arbitration proceedings — Whether s 10(1) and (3) of the Arbitration Act 2005 applied to parties who were not parties to arbitration proceedings — Whether non-party to arbitration proceedings could restrain arbitration proceeding — Whether test to restrain arbitration proceedings less stringent as against non-parties to arbitration proceedings than as against parties to arbitration proceedings — Whether learned High Court judge erred in granting plaintiff's application — Arbitration Act 2005 s 10(1) & (3)

This was an appeal against the decision of the Kuala Lumpur High Court in granting the plaintiff's application in encl 7 for an injunction to restrain the second defendant from continuing arbitration proceedings commenced by the second defendant against the third and fourth defendants. The fourth defendant was a joint venture company. The second and third defendants were the initial shareholders, with the second defendant holding 20% shares and the third defendant holding 80% shares. The fourth defendant was in need of funds to carry out a project. The plaintiff's contention was that he had played the role of a 'white knight' when he agreed to invest in the project premised on a 'collateral understanding' between himself, the second and third defendants. The plaintiff contended that premised on the collateral understanding, he had participated in the business of the fourth defendant in respect of the project. He further contended that the first and second defendants had acknowledged his beneficial ownership of part of the 80% of the fourth defendant's shares held in the name of the third defendant. In addition, the plaintiff claimed that 10% of the fourth defendant's shares held in the third defendant's name was transferred to him. However, the first and second defendants denied the existence of any collateral understanding. They were also aggrieved with the transfer of shares to the plaintiff and alleged that such transfer was in contravention of the terms and conditions of the shareholders agreement between the second, third and fourth defendants. This led to the second defendant issuing a notice of breach against the third and fourth defendants. Pursuant to the notice of breach, the second defendant commenced arbitration

A proceedings against the third and fourth defendants pursuant to the arbitration clause in the shareholders agreement. The plaintiff's application for an injunction was premised on the collateral understanding between the plaintiff, the second, third and fourth defendants and the alleged breach of the same by the second defendant. The High Court allowed the plaintiff's application and
B hence this appeal. The issues for consideration were: (a) whether s 10(1) and (3) of the Arbitration Act 2005 ('the 2005 Act') applied to parties who were not parties to arbitration proceedings; (b) whether a person who was not a party to arbitration proceedings could restrain arbitration proceeding; and (c) whether the test to restrain arbitration proceedings be less stringent as against
C non-parties to arbitration proceedings than as against persons who were parties to arbitration proceedings.

Held, allowing the appeal with costs and setting aside the decision of the learned High Court judge:

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(1) Where there were pending arbitration proceedings, as in this case, courts should have due regard to the 2005 Act and took cognisance of pending arbitration proceedings. To that extent, it was incorrect to say that the 2005 Act did not apply to the plaintiff. The learned High Court judge had erred in not giving due consideration to the pending arbitration
E between the second, third and fourth defendants and the objective of the 2005 Act. The learned High Court judge also made no finding on the nullity of the relevant agreement to justify the injunction to restrain arbitration proceedings (see paras 40 & 43).

F (2) According to the test in *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] All ER (D) 96 (Jul); [2007] EWHC 1262 (TCC) ('the *Jarvis* test'), inordinate delay was a material factor and could be fatal to an application for an injunction. The plaintiff had filed the injunction to restrain arbitration proceedings almost ten months after he became aware
G of it. There was no reasonable explanation provided by the plaintiff that would justify the delay of ten months. Thus, the learned High Court judge had erred in his finding that there was no inordinate delay by the plaintiff in his application for an injunction to restrain arbitration proceedings (see paras 50–51 & 53).

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(3) The learned High Court judge had clearly misdirected himself in referring to *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 and the repealed Arbitration Act 1952 to extend the jurisdiction of the High Court in matters which were the subject matter of
I arbitration. The *Jarvis* test provided a useful guide to restrain arbitration proceedings in respect of an application by non-parties to arbitration proceedings. The learned High Court judge had erred in using the *Keet*

Gerald Francis Noel John v Mohd Noor Bin Abdullah & Ors [1995] 1 MLJ 193 test instead of the *Jarvis* test in allowing the plaintiff's application to restrain arbitration proceedings. There was no evidence led to demonstrate the requirements of *Jarvis* test: that the continuance of the arbitration would be 'oppressive, vexatious, unconscionable or an abuse of process'. Had the learned judge used the correct test, the plaintiff's application would had been found to have fallen far short of the requirements set out in *Jarvis* test and thereby ought to have been dismissed (see paras 55, 58 & 62).

(4) There cannot be a 'higher' threshold for a party to arbitration, and a 'lower' threshold for a non-party to arbitration. For persons who were not parties to arbitration and were not bound by any award of the arbitrator, on the authority of *Jarvis*, any discretion to grant injunctions against arbitration must be exercised sparingly and with due regard to any pending arbitration and the objective and principles of the 2005 Act. In addition thereto, the application must satisfy the two conditions stipulated in that, 'the injunction does not cause injustice to the claimant in the arbitration, and the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process'. In this sense, a non-party to arbitration would have to satisfy a higher threshold to merit an injunction to arbitration proceedings than that required of a party to arbitration pursuant to s 10(1) of the 2005 Act (see paras 65 & 68).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi Kuala Lumpur dalam membenarkan permohonan plaintif dalam lampiran 7 bagi injuksi untuk menghalang defendan kedua daripada meneruskan prosiding timbang tara yang dimulakan oleh defendan kedua terhadap defendan ketiga dan keempat. Defendan keempat adalah syarikat usaha sama. Defendan kedua dan ketiga adalah pemegang saham awal, dengan defendan kedua memegang 20% saham dan defendan ketiga memegang 80% saham. Defendan keempat memerlukan dana untuk melaksanakan projek. Hujahan plaintif adalah bahawa dia telah memainkan peranan 'white knight' apabila dia bersetuju untuk melabur dalam projek yang didasarkan pada 'persefahaman kolateral' antara dirinya, defendan kedua dan ketiga. Plaintif berhujah bahawa berdasarkan persefahaman kolateral, dia telah mengambil bahagian dalam perniagaan defendan keempat berhubung projek itu. Dia seterusnya menegaskan bahawa defendan pertama dan kedua telah mengakui pemilikan benefisialnya sebahagian daripada 80% saham defendan keempat yang dipegang atas nama defendan ketiga. Di samping itu, plaintif mendakwa bahawa 10% daripada saham defendan keempat yang dipegang dalam nama

defendan ketiga dipindahkan kepadanya. Walau bagaimanapun, defendan pertama dan kedua menafikan kewujudan sebarang persefahaman kolateral. Mereka juga terkilan dengan pemindahan saham kepada plaintif dan mendakwa bahawa pemindahan itu bertentangan dengan terma dan syarat perjanjian pemegang saham antara defendan kedua, ketiga dan keempat. Ini menyebabkan defendan kedua mengeluarkan notis pelanggaran terhadap defendan ketiga dan keempat. Menurut notis pelanggaran, defendan kedua memulakan prosiding timbang tara terhadap defendan ketiga dan keempat menurut klausa timbang tara dalam perjanjian pemegang saham. Permohonan plaintif untuk injunksi adalah berdasarkan persefahaman kolateral antara plaintif, defendan kedua, ketiga dan keempat dan pelanggaran yang dikatakan sama oleh defendan kedua. Mahkamah Tinggi membenarkan permohonan plaintif dan oleh itu rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada s 10(1) dan (3) Akta Timbang Tara 2005 ('Akta 2005') terpakai kepada pihak-pihak yang bukan pihak dalam prosiding timbang tara; (b) sama ada seseorang yang bukan pihak kepada prosiding timbang tara boleh menghalang prosiding timbang tara; dan (c) sama ada ujian untuk menghalang prosiding timbang tara menjadi kurang ketat berbanding pihak-pihak bukan kepada prosiding timbang tara berbanding dengan orang yang menjadi pihak dalam prosiding timbang tara.

Diputuskan, membenarkan rayuan dengan kos dan menegetepikan keputusan hakim Mahkamah Tinggi yang bijaksana:

(1) Di mana terdapat prosiding timbang tara yang belum selesai, seperti dalam hal ini, mahkamah harus mengambil kira Akta 2005 dan mengambil tahu mengenai prosiding timbang tara yang belum selesai. Dengan itu, adalah salah untuk mengatakan bahawa Akta 2005 tidak terpakai kepada plaintif. Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam tidak memberi pertimbangan sewajarnya kepada penimbangtaraan yang belum selesai antara defendan kedua, ketiga dan keempat dan objektif Akta 2005. Hakim Mahkamah Tinggi yang bijaksana juga tidak membuat keputusan tentang pembatalan perjanjian yang berkaitan untuk membenarkan injunksi untuk menghalang prosiding timbang tara (lihat perenggan 40 & 43).

(2) Menurut ujian di *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] All ER (D) 96 (Jul); [2007] EWHC 1262 (TCC) ('ujian *Jarvis*'), kelewatan yang luar biasa adalah faktor material dan boleh menjejaskan kepada permohonan untuk injunksi. Plaintif telah memfailkan injunksi tersebut untuk menghalang prosiding timbang tara hampir sepuluh bulan selepas dia menyedarinya. Tiada penjelasan yang munasabah yang disediakan oleh plaintif yang akan membenarkan

kelewatan sepuluh bulan. Oleh itu, hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam penemuannya bahawa tiada kelewatan yang besar oleh plaintif dalam permohonannya untuk injunksi untuk menghalang prosiding timbang tara (lihat perenggan 50–51 & 53).

(3) Hakim Mahkamah Tinggi yang bijaksana dengan jelas telah salah arah dengan merujuk kepada *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 dan Akta Timbang Tara 1952 yang dimansuhkan untuk memperluas bidang kuasa Mahkamah Tinggi dalam perkara yang menjadi subjek timbang tara. Ujian *Jarvis* memberikan panduan berguna untuk menghalang prosiding timbang tara berkenaan dengan permohonan oleh pihak bukan prosiding timbang tara. Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf menggunakan ujian *Keet Gerald Francis Noel John v Mohd Noor Bin Abdullah & Ors* [1995] 1 MLJ 193 dan bukannya ujian *Jarvis* dalam membenarkan permohonan plaintif menghalang prosiding timbang tara. Tiada keterangan yang dapat membuktikan keperluan ujian *Jarvis*: bahawa penangguhan timbang tara tersebut akan 'menindas, menyusahkan, tidak disenangi atau penyalahgunaan proses'. Sekiranya hakim yang bijaksana menggunakan ujian yang betul, permohonan plaintif akan didapati jauh daripada syarat-syarat yang ditetapkan dalam ujian *Jarvis* dan dengan itu sepatutnya ditolak (lihat perenggan 55, 58 & 62).

(4) Tidak boleh menjadi nilai ambang 'lebih tinggi' bagi pihak untuk timbang tara, dan nilai ambang 'lebih rendah' untuk pihak bukan kepada timbang tara. Bagi orang yang bukan pihak kepada timbang tara dan tidak terikat dengan mana-mana award penimbang tara, atas autoriti *Jarvis*, apa-apa budi bicara untuk memberikan injunksi terhadap timbang tara mesti dilaksanakan dengan berhati-hati dan dengan mengambil kira terhadap mana-mana timbang tara yang belum selesai dan objektif dan prinsip Akta 2005. Di samping itu, permohonan itu mesti memenuhi kedua-dua syarat yang ditetapkan di dalamnya, 'perintah injunksi tersebut tidak menyebabkan ketidakadilan kepada pihak yang menuntut dalam timbang tara, dan sambungan timbang tara itu akan menindas, menyusahkan, tidak disenangi atau penyalahgunaan proses'. Dalam erti kata lain, bukan pihak kepada timbang tara perlu memenuhi nilai ambang yang lebih tinggi untuk mendapatkan injunksi kepada prosiding timbang tara daripada yang diperlukan oleh pihak kepada timbang tara menurut s 10(1) Akta 2005 (lihat perenggan 65 & 68).]

Notes

For cases on arbitration proceedings in general, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3483–3489.

Cases referred to

Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd [2002] 2 MLJ 71, CA (not folld)

Chase Perdana Bhd v Pekeliling Triangle Sdn Bhd & Anor [2007] 7 MLJ 677, FC (refd)

Compagnie Nouvelle France Navigation SA v Compagnie Nevale Afrique du Nord, The Oranie and The Tunisie [1966] 1 Lloyd's Rep 477, CA (refd)

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1; [2015] 4 CLJ 561, FC (refd)

J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd [2007] All ER (D) 96 (Jul); [2007] EWHC 1262 (TCC), QBD (folld)

Keet Gerald Francis Noel John v Mohd Noor Bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (not folld)

Lin Ming v Chen Shu Quan [2012] 2 HKLRD 547 (refd)

Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97; [1994] 2 AMR 1232, SC (refd)

Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2016] 1 SLR 373; [2015] SGCA 57, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 10(1), (3)
Arbitration Act 1952 (repealed by the Arbitration Act 2005)
Arbitration Act 1996 [NZ]
Arbitration Act 1966 [UK] s 9

Appeal from: Suit No WA-22NCC-165–05 of 2017 (High Court, Kuala Lumpur)

Su Tiang Joo (KL Pang, Teh Eng Lay, Chok Zhin Theng and Nicholas Teh with him) (Cheah Teh & Su) for the appellant.

Gopal Sri Ram (Robert Low, David Yii, Karen Yong, Chong Lip Yi, Khong Mei Yan and Damien Chan with him) (Ranjit Ooi & Robert Low) for the first respondent.

Lim Tuck Sun (Kenneth Koh with him) (Chooi & Co) for the second respondent.

David Mathews (Olivia Loh and Malarvily Perumal with him) (Gananathan Loh) for the third respondent.

Badariah Sahamid JCA (delivering judgment of the court):

[1] This appeal before us is against the decision of the KL High Court on 6 November 2017 in Suit No WA-22 NCC 165/05 of 2017 in which the High Court had granted the plaintiff's application in encl 7 for an injunction to restrain the second defendant from continuing arbitration proceedings

commenced by the second defendant against the third and fourth defendants. A

[2] For ease of reference parties will be referred to as they were in proceedings before the High Court.

ISSUE B

[3] The issue for determination before the High Court was whether the plaintiff, who is not a party to the arbitration agreement can restrain the second, third and fourth defendants who were parties to the arbitration agreement from continuing with arbitration proceedings? C

BACKGROUND FACTS

[4] The facts are derived from the learned judge's 'judgment' with necessary modifications. D

[5] The fourth defendant is a joint venture company. The second and third defendants were the initial shareholders, with the second defendant holding 20% shares and the third defendant holding 80% shares. E

'COLLATERAL UNDERSTANDING'

[6] The fourth defendant was formed to undertake a project for the provision of harbour tug services for a company called Vale Malaysia Minerals Sdn Bhd ('Vale'). The fourth defendant was in need of funds to carry out the project. The plaintiff's contention is that he had played the role of a 'white knight' when he agreed to invest in the abovementioned project premised on a 'collateral understanding' between himself, the second and the third defendants. F G

[7] The plaintiff claims that pursuant to the collateral understanding, the terms agreed were as follows:

(a) the third defendant would hold 80% shares in the fourth defendant, where part of the shares will be held on trust for the plaintiff; H

(b) the plaintiff would be entitled to participate in the fourth defendant's equity, either directly or through the third defendant's shareholding; and

(c) the second defendant agrees to the plaintiff's participation in the fourth defendant's equity, and no further consent was required for the third defendant's divestment of any part of its shares to the fourth defendant. I

A **[8]** The plaintiff contended that the first defendant was aware of the collateral understanding as he had negotiated the abovementioned terms on behalf of the second defendant.

B **[9]** On 15 March 2013, a shareholders agreement was entered into between the second, third and fourth defendants. Subsequently, the fourth defendant entered into a 'Harbour Tug Services Agreement' with Vale dated 11 April 2013.

C **[10]** The plaintiff contended that premised on the collateral understanding, he had participated in the business of the fourth defendant in respect of the project. He further contended that the first and second defendants had acknowledged his beneficial ownership of part of the 80% of the fourth defendant's shares held in the name of the third defendant.

D **[11]** In addition, the plaintiff claimed that 10% of the fourth defendant's shares held in the third defendant's name was transferred to him on 16 December 2015.There was no objection to the transfer from the second defendant and the business of the fourth defendant carried on as usual.

E **[12]** However, the first and second defendants disagreed with the plaintiff's contention. They denied the existence of any collateral understanding. They were also aggrieved with the transfer of shares to the plaintiff and alleged that such transfer was in contravention of the terms and conditions of the shareholders agreement.

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[13] This led to the second defendant issuing a notice of breach dated 1 July 2016 against the third and the fourth defendants. The plaintiff contended that the second defendant's notice was in breach of the collateral understanding.

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ARBITRATION PROCEEDINGS

[14] Pursuant to the notice of breach, the second defendant commenced arbitration proceedings against the third and the fourth defendants pursuant to the arbitration clause in the shareholders agreement. This was conducted in the Kuala Lumpur Regional Centre for Arbitration. The ambit of the arbitration clause is not in issue in this matter.

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I **[15]** The relief sought by the second defendant in the arbitration proceedings were as follows:

(a) a declaration that the transfer of the fourth defendant's 10% shares to the plaintiff was in breach of the shareholders agreement;

(b) an order that the second defendant is entitled to purchase the 10% transferred shares of the fourth defendant; and

(c) an order that the second defendant is entitled to purchase the third defendant's remaining 70% shares in the fourth defendant.

CIVIL SUITS AT THE HIGH COURT

[16] In addition, the second defendant proceeded to commence three civil suits in the Kuala Lumpur High Court ('KLHC') as follows:

(a) *KLHC Originating Summons No WA-24 NCC-280–07 of 2016 ('OS 280 Suit')*

The second defendant's application for an injunction to restrain the third defendant from disposing or dealing with its 70% shares in the third defendant as well as its 10% shares held in the plaintiff's name, pending the disposal of arbitration proceedings;

(b) *KLHC Originating Summons No WA–24 NCC (ARB)-9 02 of 2016 ('OS 9 Suit')*

The second defendant's application for an injunction to restrain the fourth defendant from proceeding with an extraordinary general meeting fixed on the 2third February 2017, to amongst others, remove the first defendant from the fourth defendant's Board of Directors.

(c) *KLHC Suit No WA-22 NCvc-544–08 of 2016 ('the tort suit')*

The second defendant's suit against the plaintiff premised on the tort of inducement, to claim damages from the plaintiff for, inter alia, inducing the third and fourth defendants to breach the shareholders agreement.

[17] Meanwhile, the arbitration proceedings commenced by the second defendant against the third and fourth defendants had reached an advanced stage and was scheduled for hearing before the arbitrator from 1–8 November 2017 and on the 27 November 2017.

INJUNCTION APPLICATION BEFORE THE HIGH COURT

[18] The plaintiff's application for an injunction is premised on the collateral understanding between the plaintiff, the second, third and the fourth defendants and the alleged breach of the same by the second defendant.

THE SECOND DEFENDANT'S SUBMISSIONS

[19] The second defendant's grounds to oppose the plaintiff's application for

an injunction to restrain arbitration proceedings may be summarised as follows:

(a) the plaintiff is estopped from opposing the arbitration proceedings on account of the plaintiff's pleaded defence in the tort suit that the issue in respect of the share transfer is subject to arbitration. The plaintiff's pleaded defence amounted to judicial admissions;

(b) the third and fourth defendants have consented to the plaintiff's application as they were parties to the transfer of the third defendant's shares in the fourth defendant to the plaintiff. However, the third and fourth defendants have by their conduct, submitted to arbitration proceedings. Thus they are estopped from taking a contradictory position that the disputes should be resolved by the courts;

(c) the plaintiff is guilty of inordinate delay of nearly ten months after he became aware of the arbitration proceedings and the tort suit in filing this application;

(d) the plaintiff's injunction application to restrain arbitration proceedings, to which the third and fourth defendants are complicit, is a tactical manoeuvre to scuttle the hearing of the arbitration proceedings;

(e) the plaintiff has not satisfied the test for an anti-arbitration injunction under s 10(1) and (3) of the Arbitration Act 2005 and the English case of *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] All ER (D) 96 (Jul); [2007] EWHC 1262 (TCC);

(f) the test in the case of *Keet Gerald Francis Noel John v Mohd Noor Bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293 (CA) is the general test for an interlocutory injunction and is not applicable to this case, which is an injunction to restrain arbitration proceedings; and

(g) the second defendant has incurred substantial costs in the arbitration proceedings.

FINDINGS AND DECISION OF THE HIGH COURT

[20] On 6 November 2017, the High Court allowed the plaintiff's application for an injunction to restrain the second defendant from continuing arbitration proceedings commenced by the second defendant against the third and fourth defendants. The reasons given by the learned High Court judge on the issues raised by the second defendant may be summarised as follows.

JUDICIAL ADMISSIONS

[21] The plaintiff's pleaded defence in the tort suit that the second, third and

fourth defendants are subjected to arbitration proceedings by virtue of the shareholders agreement, 'did not amount to a concession by the plaintiff that the share transfer issue could only be resolved by way of arbitration. The plaintiff was clearly not a contracting party to the shareholder agreement. He is as such not governed by its terms and conditions. The foundation of his claim is not with the shareholder agreement but with what he alleged as the collateral understanding. As the plaintiff was not a party to the shareholders agreement, he could not seek recourse through the arbitration proceedings. He could only ventilate his claim through this suit'.

THE THIRD AND FOURTH DEFENDANT'S CONSENT TO THE PLAINTIFF'S APPLICATION

[22] The consent of the third and fourth defendant is not a relevant factor as the plaintiff's application must be considered on its own merits. The plaintiff had correctly named the third and fourth defendants in this suit as they are parties to the shareholders agreement.

INORDINATE DELAY

[23] There was no inordinate delay on the part of the plaintiff. The chronology of events stated by the plaintiff in his affidavit justified his application at the material time. 'Although the plaintiff was candour with the fact that there was no agreement for parties to keep their dispute in abeyance, I accept the plaintiff's explanation that he had withheld any action to avoid aggravating the situation. It was only reasonable that the plaintiff would need some time to arrange and make a reasoned decision on the approach that he would need to take'.

TACTICAL MANOEUVRE

[24] The injunction sought by the plaintiff is not a tactical ploy to scuttle the hearing of the arbitration, but was the plaintiff's bid to preserve his claim over the shares.

TEST FOR ANTI-ARBITRATION INJUNCTION

[25] The plaintiff is not a party to the shareholders agreement. Consequentially, he is not and cannot be made a party to the arbitration proceedings. Thus, the provisions referred to in the Arbitration Act 2005, in particular, s 10(1) and (3) of the Act are not applicable to the plaintiff's application. On the same premise, the test in *Jarvis* and *Lin Ming* was also not applicable to the plaintiff's application as the parties in those cases were the subject of the relevant arbitration agreements.

[26] The more relevant authority is the case of *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 (CA) which decided that, 'where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court'. *Bina Jati* was cited with approval by the Federal Court in *Chase Perdana Bhd v Pekeliling Triangle Sdn Bhd & Anor* [2007] 7 MLJ 677.

[27] Where the rights of a non-party to arbitration proceedings is involved, the primary consideration on whether to grant an injunction to restrain arbitration proceedings is what would be the fairest approach to all parties. Priority should be given for the matter to be dealt with by the courts so that the party who cannot participate in the arbitration proceedings 'would not be left out in the cold'. Thus all the relevant parties can participate in court proceedings.

THE *KEET GERALD FRANCIS* TEST

[28] The test set out in *Keet Gerald Francis* is pertinent to the plaintiff's application. The plaintiff has satisfied the criteria laid down. The plaintiff's contention of the existence of a 'collateral understanding', as well as the plaintiff's role and participation in the Vale project are amongst the serious issues that merit a trial. In addition, damages would not be an adequate remedy as the shares of the relevant company 'is not readily available on the market'. The balance of convenience is also in favour of the plaintiff to avoid multiplicity of proceedings and the potential for inconsistent findings between the court and the arbitrator:

> Unlike the arbitration proceedings, all parties involved in the issue of the third and fourth defendants' shares are in this suit. The issues raised in the arbitration proceedings clearly overlaps with the issues in this suit. It would be most unfortunate if this suit and the arbitration proceedings were to run concurrently, as there is a possibility that the outcome in the arbitration proceeding and this suit conflicts with each other.

[29] Thus, the learned High Court judge was of the view that the plaintiff has shown merits in his application to restrain the second, third and fourth defendants from continuing with arbitration proceedings.

THE SECOND DEFENDANT'S GROUNDS OF APPEAL

[30] In his memorandum of appeal, the second defendant has listed ten grounds of appeal wherein the learned High Court judge had erred. These may be summarised as follows:

(a) the plaintiff is bound by his judicial admissions in an earlier court proceedings that the disputes between himself, the second and third

defendants ought to be arbitrated in arbitration proceedings. Thus the plaintiff is estopped from taking a contrary position to restrain arbitration proceedings;

(b) the position taken by the third and fourth defendants in not objecting to the injunction application to restrain arbitration proceedings is not a ground to allow the injunction application against the third and fourth defendants;

(c) the plaintiff is guilty of inordinate delay in making the injunction application, which delay is fatal to his application;

(d) the plaintiff's injunction application is a tactical manoeuvre by the plaintiff, assisted by the third and fourth defendants to subvert the arbitration agreement between the second and third defendants, and to circumvent the provisions of the Arbitration Act 2005 and scuttle arbitration proceedings;

(e) the learned judge had failed to apply the correct test to grant an injunction against arbitration as stipulated under the Arbitration Act 2005;

(f) the plaintiff had failed to satisfy the test to be granted an injunction against arbitration under the Arbitration Act 2005;

(g) the relief prayed for in the plaintiff's application for an injunction against arbitration is for a final and permanent injunction, not merely an interlocutory injunction;

(h) any award made in the arbitration proceedings is not binding on the plaintiff, who is not a party to the arbitration proceedings;

(i) the purported collateral understanding has no basis and is an afterthought of the plaintiff; and

(j) although the third and fourth defendants are named in the injunction application, the disputes between the third and the fourth defendants against the second defendant are governed by an arbitration agreement and ought not to be litigated in this injunction application.

OUR JUDGMENT

[31] After careful consideration of learned counsels' oral as well as written submissions, the appeal records as well as legal authorities, we are of the unanimous view that there are merits in this appeal that warrant appellate intervention. We therefore allow this appeal with costs and set aside the decision of the learned High Court judge. We set out below our reasons.

[32] At the outset, we note that the facts and circumstances of this case are peculiar, in that it raises a novel issue that counsels assure us have not been conclusively determined by any legal precedent or authority that they are aware of. The peculiar fact is that the plaintiff, who is not a party to arbitration proceedings has sought an injunction to restrain arbitration proceedings against the second, third and fourth defendants who are parties to pending arbitration proceedings.

[33] It is useful to summarise the primary issues raised by the appeal before us as follows:

(a) does s 10(1)(a) and (3) of the 2005 Act apply to parties who are not parties to arbitration proceedings?

(b) can a person who is not a party to arbitration proceedings, restrain arbitration proceeding? What is the test applicable to the non-party? Is it the test set out in the *Jarvis* case or the test enunciated in *Keet Gerald Francis*? and

(c) should the test to restrain arbitration proceedings be less stringent as against non-parties to arbitration proceedings than as against persons who are parties to arbitration proceedings?

APPLICABILITY OF S 10(1) AND (3) OF THE 2005 ACT TO NON-PARTIES TO ARBITRATION PROCEEDINGS

[34] The Arbitration Act 2005 ('2005 Act') came into force on 15 March 2005. The 2005 Act was modelled extensively on the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law') but drafted based on the New Zealand Arbitration Act 1996. Previously, arbitration proceedings were governed by the Arbitration Act 1952 ('the 1952 Act').

[35] The shift from the 1952 Act to the 2005 Act signals a clear shift to a position of respect for party autonomy and a non-interventionist policy of the courts once the requirements in the Act have been satisfied. Ramly Ali FCJ in the case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 at p 430; [2016] 9 CLJ 1 p 18 (FC) para 36 had enunciated the objective of the 2005 Act as follows:

> As stated in the explanatory statement to the Arbitration (Amendment) Bill 2010, (which later was passed as the 2011 Amendment), the purpose of this provision is 'to limit court intervention to situations specifically covered by the Arbitration Act and to discourage the use of inherent powers of the court.

[36] Section 10(1) of the 2005 Act provides as follows:

10 Arbitration agreement and substantive claim before court.

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) ...

(3) ...

(4) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[37] In *Press Metals* case, at p 444 (MLJ); p 32 (CLJ) para 98, Ramly Ali FCJ had observed as follows:

... under s 10 of our 2005 Act, it is mandatory for the court to make such a stay order once the requirements in the section are fulfilled.

It is clear therefore from a reading of the 2005 Act and the authorities cited, that while the 2005 Act does not have the effect of ousting the jurisdiction of the court to grant an injunction to restrain an arbitration or continuance of an arbitration, the exercise of the courts discretion will now be more sparing than before.

[38] The learned High Court judge had made a finding that s 10(1) and (3) of the 2005 Act are not applicable to the plaintiff's application to restrain arbitration proceedings on the premise that the plaintiff is not a party to the shareholder agreement and consequently, not a party to arbitration proceedings. Learned counsel for the plaintiff contended that the requirements set out in the abovementioned provision must necessarily apply only to parties to arbitration.

[39] From a plain reading of the abovementioned provision it would appear that the 'party' and 'parties' referred to in s 10(1) abovementioned are necessarily parties to arbitration. Thus, where parties have elected to resolve disputes by arbitration, rather than the courts, the courts on the premise of respect for party autonomy and a non-interventionist policy underlying the 2005 Act, will refer the parties to arbitration unless, 'it finds that the agreement is null and void, inoperative or incapable of being performed'.

[40] While it would seem that the abovementioned provisions do not apply to persons who are non-parties to arbitration proceedings, it does not mean that the plaintiff, a non-party is at liberty to derail pending arbitration proceedings on the premise that the 2005 Act does not apply to him. To do so

A would allow a non-party to arbitration to circumvent and undermine the objective of the 2005 Act. In our view, where there are pending arbitration proceedings, as in this case, courts should have due regard to the 2005 Act and take cognizance of pending arbitration proceedings. To that extent, it is incorrect to say that the 2005 Act does not apply to the plaintiff.

B

[41] A similar stand was taken in the English case of *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] All ER (D) 96 (Jul); [2007] EWHC 1262 (TCC), where the court was faced with an application to restrain arbitration proceedings. Jackson J, in stipulating certain conditions to be met by such an application also emphasised that, 'the Court's discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based'.

C

D **[42]** The English Arbitration Act 1996, similar to our 2005 Act, had effected a significant shift in the law of arbitrations in the underlying principles of both legislations: respect for party autonomy and self-restraint by the courts when intervening in the arbitral process (see *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] All ER (D) 96 (Jul); [2007] EWHC 1262 (TCC)).

E

[43] In the instant case, the learned High Court judge had erred in not giving due consideration to the pending arbitration between the second, third and fourth defendants and the objective of the 2005 Act. The learned High Court judge had erred in law in his finding that since the plaintiff was a non-party to arbitration, the 2005 Act does not apply to the plaintiff's application. The learned High Court judge also made no finding on the nullity of the relevant agreement to justify the injunction to restrain arbitration proceedings.

F

G CAN A NON-PARTY TO ARBITRATION RESTRAIN ARBITRATION PROCEEDINGS?

THE APPLICABLE TEST — *JARVIS* OR *KEET GERALD FRANCIS*?

H **[44]** Can a non-party to arbitration restrain arbitration proceedings? The contention of learned counsel for the second defendant is that arbitration proceedings can only be restrained if the court finds that the plaintiff has satisfied the test set out in the case of *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] All ER (D) 96 (Jul); [2007] EWHC 1262 (TCC) ('the *Jarvis* test).

I

[45] The *Jarvis* test for an injunction to restrain arbitration is set out at p 9 para 40 (per Jackson J) as follows:

> From this review of authority, I derive four propositions:

(i) The Court's power under section 37 of the Supreme Court Act 1981 to grant injunctions includes a power to restrain an arbitration from proceeding.

(ii) That power may be exercised if two conditions are satisfied, namely; (a) the injunction does not cause injustice to the claimant in the arbitration, and (b) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

(iii) The Court's discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based.

(iv) Delay by the party applying for an injunction is material to the Court's exercise of discretion and may in some cases be fatal to the application.

[46] The principles referred to in *Jarvis* were stated earlier by Sellars LJ in *Compagnie Nouvelle France Navigation SA v Compagnie Nevale Afrique du Nord, The Oranie and The Tunisie* [1966] 1 Lloyd's Rep 477 at p 487.

[47] Thus, according to the *Jarvis* test abovementioned, an injunction to restrain arbitration proceedings must be exercised sparingly, and with due regard to the principles of the English Arbitration Act 1966, (similar to our act of 2005) and if the two conditions are satisfied: where, 'the injunction does not cause injustice to the claimant in the arbitration, and the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process'. In addition, delay in the application for an injunction is a material factor. Pursuant to the above test, the application for an injunction to restrain arbitration in *Jarvis*'s case was dismissed.

[48] In urging this court to refer to the *Jarvis* test the learned counsel for the second defendant also referred us to the case of *Lin Ming v Chen Shu Quan* [2012] 2 HKLRD 547, a decision of the Hong Kong High Court (at p 561 paras 45–46) and Montgomery Watson NZ Ltd No CP 86/00 (per Young J) New Zealand High Court. Both Hong Kong and New Zealand are Model Law jurisdictions, while England is not. It was contended that the test applicable to the instant case and in Malaysia, should be in line with these jurisdictions on the premise the arbitration statutes of these jurisdictions like 2005 Act in Malaysia, is premised on the UNCITRAL Model Law on International Commercial Arbitration and drafted based on the New Zealand Arbitration Act 1996 (see *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1; [2015] 4 CLJ 561, Federal Court at p 32 (MLJ); p 593 (CLJ), *Law, Practice and Procedure of Arbitration* (2nd Ed) Sundra Rajoo).

[49] However, although England has not enacted the Model Law, English case law is still persuasive for two reasons. First the UK Arbitration Act 1966 was heavily influenced by Model Law, both in its structure and content. Second, the stay provisions in s 9 of the UK Arbitration Act 1966 mirrors the provision of s 10(1) of our 2005 Act which requires the court to stay proceedings unless it is satisfied that the arbitration clause is null and void, inoperative or incapable of being performed (see *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373; [2015] SGCA 57).

[50] According to the *Jarvis* test, inordinate delay is a material factor and can be fatal to an application for an injunction. It is not disputed that the plaintiff had filed the injunction to restrain arbitration proceedings almost ten months after he became aware of it. The second defendant had issued to the third and fourth defendants the notice to refer disputes to arbitration dated 19 October 2016. A copy of the said notice was extended to the plaintiff. The plaintiff only filed an application for an injunction to restrain arbitration proceedings on 29 August 2017. By this time parties in arbitration proceedings were conducting discovery of documents in preparation for the hearing scheduled to commence on 1 November 2017.

[51] There was no reasonable explanation provided by the plaintiff that would justify the delay of ten months. The learned High Court judge however had appeared to give insufficient consideration to this issue, stating, 'I accept the plaintiff's explanation that he had withheld any action to avoid aggravating the situation. It was only reasonable that the plaintiff would need some time to arrange and make a reasoned decision on the approach that he would need to take'.

[52] In the case of *Compagnie Nouvelle France Navigation SA v Compagnie Nevale Afrique du Nord, The Oranie and The Tunisie* [1966] 1 Lloyd's Rep 477, UK Court of Appeal at pp 484–485 (per Sellars LJ) an application for an injunction to restrain an arbitration proceedings that had been fixed for hearing in less than a month's time was held to be fatal to the application:

> ... But the writ to stay these arbitration proceedings was no earlier than Nov 19, 1965, in relation to a hearing which had been fixed after application of the parties, for Dec 13, 1965. It is well established that delay is most prejudicial to the granting of an injunction. That ground alone, I think, would be sufficient to justify the refusal by the learned Judge to make the order asked for.

[53] Thus, in our view, the learned High Court judge had erred in his finding that there was no inordinate delay by the plaintiff in his application for an injunction to restrain arbitration proceedings.

MULTIPLICITY OF/CONCURRENT PROCEEDINGS

[54] The learned High Court judge had also erred in his finding that the prospect of multiplicity of or concurrent proceedings is a sufficient reason to restrain arbitration proceedings. The learned judge had referred to the case of *Bina Jati* as authority for the position that other than fraud, the arbitrator's jurisdiction may be ousted where there is a prospect of multiplicity or concurrent proceedings that can give rise to inconsistent decisions. Alauddin JCA (as he then was) had stated as follows:

> The ousting of the arbitrator's jurisdiction is not limited to fraud alone but extends to:
>
> (a) The avoidance of multiplicity of suits;
>
> (b) The allegations connected to the subject matter which affects parties who are outside the arbitration clause; and
>
> (c) All issues ought to be tried by one tribunal.

[55] While it may have been the case prior to the 2005 Act that issues of multiplicity of suits and possibility of inconsistent findings between a decision of the court and that of an arbitrator may be material factors to oust the jurisdiction of an arbitrator, such factors are no longer material under the 2005 Act. The learned High Court judge had erred in making the multiplicity of proceedings and the potential of inconsistent findings the primary reason to restrain arbitration proceedings. It is clear, however that *Bina Jati* which was decided when the 1952 Act was in force is no longer applicable as the 1952 Act has been repealed and replaced by the 2005 Act. Thus, the learned High Court judge had clearly misdirected himself in referring to *Bina Jati* and the repealed 1996 Act to extend the jurisdiction of the High Court in matters which are the subject matter of arbitration.

[56] In *Jarvis* case, the prospect of concurrent proceedings and the consequences of inconsistent findings was held to be insufficient grounds to restrain arbitration proceedings. At p 10 para 47, it was held as follows:

> ... the prospect of concurrent proceedings in the present case, with all the usual consequences of concurrent proceedings, does not make the arbitration either vexatious or unconscionable or an abuse of process.

[57] It is noteworthy that *Jarvis* was decided in 2007 after the enactment of the English Arbitration Act 1996 which had effected a significant shift to arbitration and non-intervention by courts, a shift that is comparable to a shift in our legal landscape effected by our 2005 Act. Thus, the learned High Court judge had erred in placing importance on the prospect of multiplicity of proceedings as a ground to restrain arbitration proceedings.

[58] Learned counsel for the plaintiff has rejected the *Jarvis* test on the grounds that the facts of *Jarvis* case can be distinguished from the instant case in that Jarvis was a party to arbitration while the plaintiff in the instant case is a non-party. Justice Jackson was however stating the general principles applicable for a court to grant an injunction to restrain arbitration proceedings. Nowhere was it stated that such principles are inapplicable to persons who are non- parties to arbitration proceedings. Nor should such a restrictive interpretation be inferred. We are of the considered view that the test in *Jarvis* case provides a useful guide to restrain arbitration proceedings in respect of an application by non-parties to arbitration proceedings.

THE KEET GERALD FRANCIS TEST

[59] Thus, in our view the learned High Court judge had erred in using the test in *Keet Gerald Francis* to determine whether the plaintiff's application for an injunction against arbitration had satisfied the requirements of the existence of serious issues to be tried, the adequacy of damages in lieu of an injunction and whether the balance of convenience favoured the plaintiff.

[60] The test referred to in *Keet Gerald Francis* is a general test for the grant of interim injunctions. It has no application on the facts and circumstances of this case which is the subject matter of arbitration proceedings and therefore subject to the clear and express provisions of the 2005 Act, in particular ss 10(1), (3) and 8 abovementioned.

[61] The *Keet Gerald Francis* test only applies as an interim measure to preserve the status quo between parties to a dispute pending the trial of the 'serious issues' between the parties for a final and permanent resolution. Such a rationale has no application in the instant case where the parties in the arbitration proceedings are different from the parties in the suits before the court.

[62] Thus the learned High Court judge had erred in using the *Keet Gerald Francis* test instead of the *Jarvis* test in allowing the plaintiff's application to restrain arbitration proceedings. There was no evidence led to demonstrate the requirements of *Jarvis* test: that the continuance of the arbitration would be 'oppressive, vexatious, unconscionable or an abuse of process'. Had the learned judge used the correct test, the plaintiff's application would have been found to have fallen far short of the requirements set out in *Jarvis* case and thereby ought to have been dismissed.

SHOULD THE TEST TO RESTRAIN ARBITRATION PROCEEDINGS BE LESS STRINGENT AS AGAINST NON-PARTIES TO ARBITRATION PROCEEDINGS THAN AS AGAINST PERSONS WHO ARE PARTIES TO ARBITRATION PROCEEDINGS?

[63] Learned counsel for the plaintiff is of the view that there is no legal impediment for a person who is not a party to arbitration to restrain arbitration proceedings. Learned counsel for the plaintiff went further to propose that the threshold requirements for an injunction to restrain arbitration proceedings should be lower for a non-party to arbitration proceedings than for a person who is a party to the arbitration proceedings, on the basis that the latter is contractually bound to abide by the arbitration agreement, whereas a non-party is not bound as such.

[64] We are in total agreement with learned counsel for the plaintiff that where parties have entered into an agreement to refer disputes to arbitration, they are contractually bound to abide by such agreement and courts will give effect to such agreement. This position was succinctly expressed by Edgar Joseph JR SCJ in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 112; [1994] 2 AMR 1232 at p 1250 when His Lordship observed:

> ... the approach of the courts will be that those who make a contract to arbitrate their disputes, should be held to their bargains ...

Consistent with the above stand pursuant to s 10(1) of the 2005 Act, courts are bound to refer parties to arbitration 'unless it finds that the agreement is null and void, inoperative or incapable of being performed'. Be that as it may, the contractual duty of parties to arbitration to abide by the arbitration contract should not be a basis to impose by comparison a lower threshold on persons who are not parties to any arbitration agreement and therefore not contractually bound.

[65] We are not persuaded by the abovementioned argument for the following reasons. There cannot be a 'higher' threshold for a party to arbitration, and a 'lower' threshold for a non-party to arbitration. To accede to the above proposition would lead to the absurd position that it would be easier for a non-party to arbitration proceedings to obtain an injunction to restrain arbitration proceedings than a party to arbitration proceedings would!

[66] For the sake of argument, even if two sets of thresholds tests to injunct arbitration proceedings is accepted, there would be more reason for the higher threshold to be applied to a non-party to arbitration proceedings since the fact

of the matter is that as a non-party, he is not a participant to any arbitration proceedings and therefore any award by an arbitrator would not bind him. If a 'stranger' to an arbitration agreement is allowed easily to restrain arbitration proceedings, the rationale and objective of the 2005 Act will be seriously undermined by those who are non-parties to arbitration.

[67] In our view, parties to arbitration are undoubtedly subject to the requirements stipulated by s 10(1) and (3) of the 2005 Act in matters which are the subject matter of arbitration. Parties to arbitration agreement are contractually bound to submit to arbitration and in line with respect for party autonomy and the non-interventionist policy of the courts pursuant to the 2005 Act, courts would lean in favour of arbitration proceedings.

[68] As for persons who are not parties to arbitration and are not bound by any award of the arbitrator, on the authority of *Jarvis*, any discretion to grant injunctions against arbitration must be exercised sparingly and with due regard to any pending arbitration and the objective and principles of the 2005 Act. In addition thereto, the application must satisfy the two conditions stipulated in that, 'the injunction does not cause injustice to the claimant in the arbitration, and the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process'. In this sense, a non-party to arbitration would have to satisfy a higher threshold to merit an injunction to arbitration proceedings than that required of a party to arbitration pursuant to s 10(1) of the 2005 Act as discussed above.

[69] We are in agreement with learned counsel for the second defendant that the *Keet Gerald Francis* test used by the learned High Court judge was the wrong test. We are minded to agree with learned counsel for the second defendant that the correct test is that set out in *Jarvis*. On the facts of the case we do not find that the arbitration would cause injustice to the claimant or that the continuance of the arbitration would be 'oppressive, vexatious, unconscionable or an abuse of process'. In addition, the plaintiff is guilty of inordinate delay in making the injunction application almost ten months after he was made aware of arbitration proceedings.

[70] In conclusion, the learned High Court judge was plainly in error in his decision to allow the plaintiff's application to restrain pending arbitration proceedings between the second, third and fourth defendants. Based on the reasons above, we are unanimous in allowing this appeal with costs. The decision of the learned High Court judge is set aside.

Appeal allowed with costs and decision of learned High Court judge set aside.

Reported by Ahmad Ismail Illman Mohd Razali